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IN THE

Supreme Court of the United States

October Term, 1958

No. 478

FAREED N. KIAMIE and KIAMIE MANUFACTURING CO., INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

FAREED N. KIAMIE and KIAMIE FABRICS CO., INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on September 3, 1958.

Opinion Below

The opinion of the Court of Appeals set forth in the Appendix has not been reported.

Grounds of Jurisdiction

The judgment of the Court of Appeals was entered September 3, 1958. Timely petition for rehearing (filed September 17, 1958) was denied September 30, 1958. Jurisdiction is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Where during investigation of his income tax liability a taxpayer voluntarily makes an incriminating admission coupled with an exculpatory explanation, and the admission is later made the basis of an indictment and bill of particulars charging him with income tax evasion, upon a trial of the indictment may the admission be received in evidence against the declarant as proof of the facts stated therein without permitting the jury to give the same probative force to the explanation?

2. Where the prosecutor in concluding his summation said to the jury:

> "Now I am sworn to an oath, and you have sworn to your oath. It is not a pleasant thing that we do, but it is a very necessary thing, and I say to you ladies and gentlemen of the jury from the bottom of my heart, that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations. Thank you very much.",

were petitioners deprived of their constitutional right to a fair trial?

3. Where indictments and bills of particulars together narrowed the charge by stating that petitioners had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns, was there a deprivation of petitioners' constitutional rights to be informed of the nature of the accusation and to be tried upon the indictment of a grand jury when the Government with approval of the trial court departed in mid-trial from the

charge of guilt resting on proof of unreported sales, and asserted that petitioners evaded income taxes by applying an improper gross profit percentage to the sales that were in fact reported on the tax returns for the indictment years?

Constitutional Provisions and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix, *infra* (A 18-20).

Statement of the Case

Petitioners were tried upon two indictments. The first charged in one count that Kiamie Manufacturing Co., Inc. (Kiamie Mfg.) and Kiamie, as president, filed a false return understating the corporation's net income and tax for its fiscal year ending January 31, 1946 (R 15a-16a).[1] The second charged in three counts that Kiamie Fabrics Co., Inc. (Kiamie Fabrics) and Kiamie, as president, filed false returns understating the corporation's net income and tax for each of its three fiscal years ending April 30, 1945, 1946 and 1947 (R 17a-18a). The first indictment was filed July 12, the second July 14, 1951 (R 15a-19a).

Bills of particulars (one for each indictment) were filed in September 1951 and amended bills in January 1956 (R 24a, 32a, 47a, 53a). Each bill asserted that petitioners had evaded corporate income taxes by wilfully failing to report specified sales, and identified each sale by name and address of customer, date and invoice amount, affirmatively stating that the evasion was not committed in any other way (R 24a-26a, 32a-45a, 47a-51a, 53a-66a). As the Court of Appeals noted, these

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[1] Numerals in parentheses with the letter "A" prefixed refer to pages of the Appendix; with the letter "R" prefixed, to pages of the Appendix to appellants' briefs in the Court of Appeals; and with the letter "G" prefixed, to the Government's trial exhibits. Letters in parentheses refer to defendants' trial exhibits.

> "Bills of particulars narrowed the charge by stating that appellants had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns for those fiscal years." (A 3)

The Government's case consisted of evidence intended to show that the specified sales were not recorded as such in the regular corporate books, nor reported as such in the corporate income tax returns for the indictment years, and to show the resulting tax deficiencies and criminal intent. In computing alleged tax deficiencies the Government's agent-witness was asked simply to add the unrecorded sales in each indictment year to those reported in the return for that year, to assume that "cost of goods sold" was as stated in the return, and to calculate any deficiency in the income and tax reported (R 735a-38a; G 308-G 371). Having thus limited its proof to the charge, as narrowed by the bills of particulars, the Government rested (R 738a).

Petitioners conceded at the trial, as they had almost from the inception of the Government's investigation, that the corporate sales which the bills of particulars specified as unreported had not been recorded as such in the corporate books, nor reported as such in the returns (R 519a, 529a, 548a-51a, 981a-83a). But petitioners asserted these sales were in effect reflected in the books and the returns by substituting substantially equivalent amounts of fictitious intercorporate sales in the books and returns (R 519a, 529a, 548a-51a, 1515a-18a, 1685a, 1694a, 1832a-34a).

Petitioners' defense was that owing to scarcities and OPA restrictions Kiamie's enterprises, in the struggle for continued existence and economic survival, were compelled to make purchases at over-ceiling prices and overages both payable in cash.[2] To provide the needed cash and yet avoid OPA inquiry, checks received in payment for goods sold were cashed. Neither these sales nor the purchases made

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[2] There was no claim and no evidence that the Kiamie enterprises ever *sold* in the black market or over OPA ceilings.

with the cash proceeds were recorded as such in the regular books of account (R 79a-82a, 452a-54a).

However, a record of these transactions was separately kept. Indeed, in 1948, early in the Government's tax investigation, petitioners voluntarily caused their accountant to prepare and their counsel to deliver to Government agents a schedule listing by date, name and address of customer, invoice number and amount, every unrecorded sale made in 1943, 1944 and 1945 (R 441a-48a, 452a-56a, 468a-69a, 507a; G 229). At the same time petitioners' counsel delivered to the Government agents a schedule of unrecorded purchases made in the same period with the cash proceeds of the unrecorded sales (R 981a-83a). Both schedules were stapled together and turned over as one document (R 435a-44a, 452a-54a).

Details of the unrecorded sales, even including clerical errors, were taken bodily from petitioners' schedule of unrecorded sales into the bills of particulars (R 79a-80a, 1241a-42a; G 229).

At the trial this same schedule became the basic and most important item of Government proof. The prosecutor detached petitioners' schedule of unrecorded sales from their schedule of unrecorded purchases and introduced the former as an admission and proof that the sales there listed had in fact been made and had not been recorded in the corporate books nor reported in the returns (R 981a-83a).

While thus receiving this incriminating schedule of unrecorded sales against petitioners, the trial judge refused to receive their exculpatory schedule of unrecorded purchases as part of the same document (R 454a-63a). And even when, much later and as part of petitioners' defense, their detached schedule of unrecorded purchases was received in evidence, the jury were told they could not consider its contents as any proof that the proceeds of unrecorded sales had in fact been used to make unrecorded purchases, but only as evidence that petitioners had made such a claim to the revenue authorities in 1948 (R 981a-83a).

It thus became vitally important for petitioners to prove they had substituted fictitious intercorporate sales in place of unrecorded sales in the corporate books and on the tax returns. This they did by overwhelming evidence. In fact, as the trial court charged,

> "The evidence that these intercorporate sales were fictitious is overwhelming * * *" (R 1832a)

The jury were instructed that, in determining whether the returns had understated gross profit, they "must" deduct the fictitious intercorporate sales from the reported "gross sales" and then add the unrecorded sales (R 1830a-31a). Thus, the court charged the jury that reported intercorporate sales were a substitute for unrecorded sales.

The trial judge also prepared as "Court's Exhibit 4" a summary of the figures in petitioners' schedule of intercorporate sales (XT), grouping them into indictment years, referred to it in detail in his charge and sent it to the jury room (R 1832a-34a).

The cogent proof that fictitious intercorporate sales were substituted for unrecorded sales is illustrated by the following comparison:

Unrecorded Sales[3]	*Intercorporate Sales*
(G 233)	(Court's Exh. 4)
$643,131.16	$636,322.87

Clearly, then, the jury's verdict cannot be sustained as a finding that petitioners are guilty of the narrowed charge that they evaded corporate income taxes by failing to report corporate sales. The finding of tax evasion was made possible by presenting to the jury the new and different accusation that, although petitioners had in effect reported the unrecorded sales, they applied to the reported gross sales

[3] This figure is based on sales price before deducting commissions paid for check cashing amounting to $7,195.06 (G 318), leaving a balance of $635,936.10 as compared with the $636,322.87 in intercorporate sales.

(including intercorporate sales) an improper gross profit percentage.

Petitioners used the well-recognized and customary gross profit percentage method of computing gross profits, *i.e.*, they applied to the dollar amount of gross sales a percentage of gross profit based on experience and prevailing business conditions (R 1472a-77a).

Gross profit percentage was not mentioned in the bills of particulars. No proof whatever as to gross profit percentage had been introduced by the Government as part of its case. On the contrary, the bills of particulars had explicitly stated "that no part of the excess income was derived from sources other than unreported sales of merchandise", or "by reason of the disallowance of any part of the cost of goods reported * * *."[4] The Government further stated that "no part of the excess income arose as the result of the disallowance of deductions", thus leaving only unreported sales in dispute (R 27a, 44a, 50a, 65a).

Nevertheless, the trial judge refused to permit proof that intercorporate sales were substituted for unrecorded sales unless petitioners would undertake to show that after this substitution they applied an "honest" gross profit percentage to all reported sales (R 1458a-69a). This, under protest, petitioners endeavored to do (R 1461a-69a).

Thus, what had originated with the grand jury as a simple unrecorded sales case became during the trial an improper gross profit percentage case. And, since the new charge arose after the Government had introduced proof of unrecorded sales and then rested, by a subtle shift-

[4] The bills of particulars stated that "the cost to the corporation of all merchandise sold during the said fiscal years, including the value of the corporation's inventory at the beginning and close of said fiscal years, the total amounts paid during said fiscal years for the merchandise; and the aggregate of each of the class of expense for said fiscal years, comprised under the heading 'Cost of Goods Sold' are the figures contained in the income tax returns filed by the defendant" (R 27a, 44a, 50a, 65a).

ing of the burden of proof petitioners were required to show affirmatively that they had used a proper gross profit percentage, while the Government was relieved of its obligation to establish the crime charged, and only that crime, beyond a reasonable doubt.

Finally, this radically altered accusation was presented to the jury by the prosecutor in a grossly improper summation (see Question 2, *supra*, p. 13). He identified himself with the jury and his duty with theirs and gave fervid expression to a personal conviction of petitioners' guilt, spoken, as he said, "from the bottom of my heart". The Court of Appeals was "disturbed" even by a de-emphasized version of the prosecutor's remarks (A 17), although the most objectionable words used are not repeated in the opinion (A 17).

REASONS FOR GRANTING THE WRIT

Question No. 1

We have briefly described the District Court's treatment of petitioners' schedule of unrecorded purchases (MQ), as contrasted with its treatment of petitioners' schedule of unrecorded sales (G 229), the backbone of the Government's case. That treatment raises the question:

> Where an incriminating admission is coupled with an exculpatory explanation, may the admission be received in evidence against the declarant as proof of the facts stated therein, without permitting the jury to give the same probative force to the explanation?

Admittedly, G 229 was stapled to MQ when petitioners voluntarily delivered both schedules to Government agents as one document. However, as the Court of Appeals noted, G 229 "was received during the Government's case as proof of the facts stated therein", but MQ "was not admitted as proof of the facts stated therein" (A 14-15).

Nonetheless, the Court of Appeals concludes "that this ruling was not erroneous" (A 15-16), citing cases which, peculiarly enough, petitioners had cited as demonstrating that the ruling was erroneous (App. Br. p. 59). The lower court cites those cases for the proposition that

> "229 having been properly treated as an admission, MQ could be treated as an exculpatory portion of an admission or as an explanation of an admission" (A 15-16).

But the District Court did not give Exhibit MQ the evidentiary effect required by this basic rule of evidence.

Exhibit MQ could have been "treated as an exculpatory portion of an admission" only if it were admitted as proof of the facts stated therein, to be given such weight as the jury deemed warranted. For a statement which may not be taken as proof of the facts stated cannot possibly be exculpatory of the incriminating admission which it attempts to explain. An explanation which cannot be credited is no explanation at all. It is precisely because the District Court prevented the jury from giving MQ any weight as exculpation or explanation that reversible error was committed.

This is clear from the trial court's instructions to the jury when he finally received Exhibit MQ in evidence (R 981a-83a):

> "So this paper, under the law, may now be submitted to you, although under ordinary circumstances it couldn't, *for the purpose of showing that at that time*, when the defendants were in negotiation with the Internal Revenue officers, *they made this claim* that the money which was indicated to have been received by Exhibit 229 had been disbursed in a certain way. So that while the paper is in evidence *it is in evidence only for the purpose of showing that that claim was made at that time, and if the defendants wish to show you what actually was done with that money that evidence will have to come from some other source. This cannot be treated as proof of what actually was done with the money. It is only*

before you to show that the claim was made at that time." (Emphasis ours.)

In other words, the District Court told the jury:

> The defendants have told the Government that there were millions of dollars in unrecorded sales (G 229). Not only may you believe that the defendants made that statement, but you may also believe that the statement is true. The defendants also have told the Government there were millions of dollars of cash purchases made with the proceeds of the unrecorded sales (MQ). You may believe that statement was made, but you may not consider the document (MQ) as any proof that the statement is true. All you may believe with respect to this second statement is that it was made at the same time that the first statement was made.

The ruling below is so basically unfair and one-sided that one is not surprised to find it in conflict with a principle of evidence of ancient judicial origin. This Court held erroneous the virtually identical treatment given an admission by the lower courts in *Insurance Company* v. *Newton*, 89 U. S. 32, 35 (1874), where Justice Field stated:

> "The court below allowed the statement of the company and its agent to the witness as to the sufficiency of the proofs of death of the insured to be received as conclusive of that fact, but by its charge to the jury in effect separated the admission of that fact from its accompanying language, that the proofs disclosed a case of suicide, and held that this latter statement was of an independent fact to be established by the company. In this particular we think the court erred. Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law. Here the admission related to the two particulars which the proofs established, the death of the insured and the manner of his death, both of which facts appear by the same documents. They showed the death of the insured only as they showed that he had com-

> mitted suicide, and all that the officers of the company evidently intended by their declaration was that they were satisfied with the proofs of the one fact because they established the other. The whole admission should, therefore, have been taken together. If it was sufficient to establish the death of the insured, it was also sufficient to show that the death was occasioned in such a manner as to relieve the company from responsibility."

The holding below is also in conflict with other Circuit and State court decisions. See, *Perrin* v. *United States*, 169 Fed. 17, 26-27 (9 Cir. 1909); *Gangi* v. *Fradus*, 227 N. Y. 452, 456, 457 (1920); *People ex rel. Perkins* v. *Moss*, 187 N. Y. 410 (1907); 2 Wharton's Criminal Evidence (12 Ed. 1955) § 361. It is not supported even by *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680 (2 Cir. 1944), *cert. denied*, 323 U. S. 769, relied on by the court below. There, plaintiff introduced part of defendant bank's history sheet as proof of the facts recorded. Other entries in the same sheet were properly received at defendant's instance as part of an entire admission, under the settled rule stated by the court as follows:

> "Where a part of a writing has been received in evidence as containing admissions, the party against whom it is offered may introduce the rest of the writing to explain or qualify the alleged admissions." (*Id.* p. 682)

These authorities hold that all parts of an admission are equally admissible and that the probative weight to be given the admission, in whole or in part, is for the jury to determine and not the court.

The treatment of MQ by the lower courts also violates Rule 26 of the Federal Rules of Criminal Procedure (A 20). If, as has been suggested by one eminent authority,[5] "uniformity of the law of evidence is neces-

[5] Holtzoff, on Criminal Cases in the Federal Courts, printed as a preface to the Federal Rules of Criminal Procedure: 1955 Revised Edition.

sary in criminal cases" and in the course of time Rule 26 "may permit the gradual growth and development of a Federal criminal law of evidence", it seems of first importance that the present error should be corrected, not only to preserve uniformity in the law of criminal evidence in the Federal courts, but to stifle at once an error which, if permitted to grow and spread, may insidiously permeate that law.

The error is substantial. As the lower court recognized, it was essential for the defense to prove "that the unrecorded sales were matched by a similar amount of unrecorded black market purchases" (A 4). As that court noted, Exhibit MQ was "a schedule of alleged cash payments to some twenty-nine vendors * * * totaling $1,405,157.05", and "was delivered to the investigating agents as Kiamie's explanation for the unrecorded sales" at the same time that Exhibit 229, "a schedule of unrecorded sales * * * totaling $1,323,334.42 was made available to them" (A 4). While the trial court permitted the Government to establish the petitioners' guilt through 229, they were not permitted to establish their innocence through MQ.

This Court has repeatedly considered the misuse of admissions as warrant for certiorari, *e.g.*, *Smith* v. *United States*, 348 U. S. 147 (1954); *United States* v. *Calderon*, 348 U. S. 160 (1954); *Opper* v. *United States*, 348 U. S. 84 (1954); *Lutwak* v. *United States*, 344 U. S. 604 (1953); *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Fiswick* v. *United States*, 329 U. S. 211 (1946).

As a question of evidence the issue here raised is one of serious import. But it goes beyond the field of evidence and strikes at the foundation of our self-assessment system of taxation, namely, taxpayer cooperation with Government representatives. As was recently stated in a Progress Report of the Subcommittee on Internal Revenue Taxation to the Committee on Ways and Means of the House of Representatives, 85th Cong., 1st Sess. 24 (April 22, 1957):

> "The task of the [Internal Revenue] Service is without a doubt the most sensitive of any task in the Federal administrative structure. Operating under a huge body of technical, complex tax laws, it has to do business directly with an enormous number of taxpayers and in a manner which will encourage their cooperation with a system geared largely to full reporting and self-assessment. The single most important factor of successful Federal tax enforcement in this country is taxpayer attitude."

The taxpayer who freely reveals the facts affecting his tax liability should not be confronted in a later tax prosecution with the full force of those disclosures which tend to incriminate him and yet be denied equal probative advantage from those concomitant disclosures which proclaim his innocence. The rulings below are an invitation to taxpayers to invoke the Fifth Amendment rather than give assistance to the Government in determining whether a deficiency exists.

Question No. 2

Although the Court of Appeals expressed concern regarding the prosecutor's remarks in his summation, it held (A 17):

> "We are disturbed that the prosecutor stated at the close of his summation his personal belief 'that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations.' But defense counsel had already stressed to the jury his belief in appellants' innocence, and thus, as the trial court put it, placed the prosecution in the position of having to say, 'Well, I, too, believe in the case that I have been presenting.' See, *Lawn* v. *United States*, 78 S. Ct. 311, 303 n. 15 (1958); *Henderson* v. *United States*, 218 F. 2d 14, 19 (6 Cir. 1955), *cert. denied*, 349 U. S. 920 (1955)."

This comparative paraphrase minimizes the force of the prosecutor's summation and magnifies that of defense counsel.

At the end of a vigorous address castigating petitioner Kiamie,[6] the prosecutor said:

> "Now I am sworn to an oath, and you have sworn to your oath. It is not a pleasant thing that we do, but it is a very necessary thing, and I say to you ladies and gentlemen of the jury from the bottom of my heart, that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations.
>
> Thank you very much." (R 1778a.)

Defense counsel, in his summation, had stated:

> "I don't think I need say much more. You know the charge; you have heard the evidence. I think he is entitled to an acquittal, and I don't think you can brand him a criminal on the kind of testimony that has been produced before you.
>
> Thank you very much." (Gov't Appendix 285a)

The statement by defense counsel of his view that petitioners should be acquitted on the evidence was nothing more than expression of professional opinion, proper and indeed unavoidable in any summation. It certainly did not invite or justify the prosecutor's inflammatory peroration. In response, the United States Attorney went far beyond simply saying, in effect, "Well, I, too, believe in the case that I have been presenting."[7]

First, he stated:

> "Now I am sworn to an oath, and you have sworn to your oath."

This was strong indication that, as it was the prosecutor's sworn duty to prosecute, so it was the jury's sworn duty

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[6] The portion of the Government's summation here dealt with was only the culmination of a series of earlier improper statements to which futile objection was made by petitioners. (See *e.g.*, R 1736a-40a, 1742a, 1753a, 1757a, 1759a, 1763a, 1768a-69a, 1771a-72a, 1775a-76a, 1778a, 1780a-94a.)

[7] He had already done this at the beginning of his summation (R 1736a).

to convict. The impression was deepened by the next sentence:

> "It is not a pleasant thing that *we* do, but it is a very necessary thing, * * *." (Emphasis ours.)

It would not be "a pleasant thing" to convict, and this identification of the prosecutor with the jury by his use of the embracing "we" was improper. *Steele* v. *United States*, 222 F. 2d 628, 631 (5 Cir. 1955). The identification of their respective obligations was as bad if not worse. As this Court said in *Berger* v. *United States*, 295 U. S. 78, 88 (1935):

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

This wise admonition was disregarded by the prosecutor when he said in conclusion:

> "* * * I say to you ladies and gentlemen of the jury *from the bottom of my heart*, that on the facts in this case *we* have no alternative but to *bring back a verdict of guilty* * * *." (Emphasis ours.)

The lower courts here are the only ones, so far as we know, which have countenanced such an appeal to a jury. To the contrary, use of the very same phrase—"the bottom of my heart"—in a prosecutor's summation was condemned in *State* v. *Thayer*, 124 Ohio St. 1, 176 N. E. 656, 657 (1931). Similar comments have been disapproved by bench and bar. *People* v. *Lovello*, 1 N. Y. 2d 436, 439 (1956); *People* v. *Swanson*, 278 App. Div. 846 (2d Dept. 1951); *State* v. *Gunderson*, 26 N. D. 294, 144 N. W. 659, 660 (1913); See, Canon 15, Canons of Professional Ethics (N. Y. State Bar Assn.).

This may be the occasion to revivify the high standard of conduct for prosecutors set by this Court in *Berger* v. *United States*, *supra* (p. 88):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The standard thus fixed, as we believe, requires that the prosecutor's inflammatory summation at bar be disapproved and that the resulting conviction be reviewed and reversed by this Court on that ground alone.

Question No. 3

The indictments omitted and the bills of particulars expressly disclaimed the charge of improper gross profit percentage which was ultimately submitted to the jury.

The Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding." Rule 2. Accordingly, they require that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged". Rule 7(c). To clarify an indictment the court "may direct the filing of a bill of particulars." Rule 7(f).

The Third Circuit has held that where a bill alleged collection of dues from named persons on specified dates, it was error to permit a later bill alleging collection of dues from other persons on other dates, saying that a—

> "bill of particulars strictly limits the prosecution to proof within the area of the bill." *United States* v. *Neff*, 212 F. 2d 297, 309 (1954).

This Court, in *Glasser* v. *United States*, 315 U. S. 60, 66 (1942), in upholding an indictment as sufficient, affirmed the Court of Appeals for the Seventh Circuit, which had stated:

> "The object of a bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions in question, so that he may be prepared to make his defense. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars."

The Eighth Circuit in *Braatelien* v. *United States*, 147 F. 2d 888 (1945), held:

> "Where the facts are detailed in a bill of particulars, he who furnished it will be confined by the court to the proof of the facts so specified."

Bryan v. *United States*, 175 F. 2d 223 (5 Cir. 1949), *aff'd*, 338 U. S. 552 (1950), is apposite. The indictment charged income tax evasion by filing false returns. Bills of particulars limited "the alleged evasions to understatements of the gross receipts derived from the business operated by appellant." There, as here, the bills expressly excluded the claim that the deductions taken were improper. Reversing the conviction, the Fifth Circuit Court of Appeals said (p. 224):

> "Measured, as the proof must be, by these bills of particulars, the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question."

By this test the evidence was found insufficient. This Court affirmed.

Here, the court below stated:

> "Bills of particulars narrowed the charge by stating that appellants had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns for those fiscal years."

Nevertheless, it permitted the charge to be changed from one of tax evasion by failure to report specified corporate sales to a wholly different charge of tax evasion by applying to *reported* sales an improper gross profit percentage. This the court did notwithstanding the express statement in the bills of particulars that "no part of the excess income was derived from sources other than *unreported* sales of merchandise." (Emphasis ours.)

The bills contain the further clarification that no part of the alleged excess net income arose "by reason of the disallowance of any part of the cost of goods reported." This should have precluded the later claim of the use of an improper gross profit percentage, since the percentage determines the gross profit and by deducting gross profit from sales computes the cost of goods sold (R 1480a-81a). Therefore application of an incorrect gross profit percentage necessarily results in an incorrect calculation of costs. To challenge percentage is to challenge costs. Yet the bills assured the defendants that no part of the "cost of goods reported" was questioned.

The courts below, in sanctioning the Government's departure at the trial from its bills of particulars, are not only in conflict with Courts of Appeal in other Circuits, but their holdings have deprived petitioners of their constitutional right "to be informed of the nature and cause of the accusation" against them (Sixth Amendment), and to be tried upon "a presentment or indictment of a Grand Jury." (Fifth Amendment.) Here the crime tried was not the crime charged. There was an improper change of the charge at the trial.

The indictments themselves confined the charge to one of unrecorded sales. The figures set forth in the indict-

ments were computed by adding the unrecorded sales to the net income figures appearing in the corporate income tax returns.[8]

The Court of Appeals, Third Circuit, stated in *United States* v. *Krepper*, 159 F. 2d 958, 970 (1946), *cert. denied*, 330 U. S. 824 (1947):

> "When an indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. * * * This was the doctrine of the English courts under the common law. It is the uniform ruling of the United States Courts except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the Constitution above recited [Fifth Amendment], which would be of little avail if an indictment once found can be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case."[9]

Not only did the case go to the jury upon a radically altered charge of guilt, but this altered charge was one which, by a subtle shifting of the burden of proof, petitioners were required to *disprove*. Had the indictments and bills of particulars in the first place charged petitioners with tax evasion by application of a dishonest gross profit percentage, the burden of proving the charge beyond a

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[8] For example, the first count in indictment C 136-60 alleged that "the net income" set forth in the return was "$3,285.92" and that it should have been "$384,396.85". The difference is exactly the amount of unrecorded sales attributed by the Government to the defendant companies, $381,110.93 (R 18a, 53a; G 229).

[9] To the same effect are *Epstein* v. *United States*, 174 F. 2d 754, 760, 763 (6 Cir. 1949)—indictment charged fraudulently excessive prices while proof showed violation of fiduciary duty; *United States* v. *Byers*, 73 F. 2d 419, 421-422 (2 Cir. 1934)—indictment charged fraudulent buying but proof showed fraudulent selling; *Hallman* v. *United States*, 208 F. 2d 825, 826-827 (D. C. Cir. 1953)—indictment charged sale of narcotics to James Fair and proof showed sale to Roland Jones.

reasonable doubt would have been with the Government and would never have shifted to the defense. *United States* v. *Indian Trailer Corporation*, 226 F. 2d 595, 598 (7 Cir. 1955); and see *Holland* v. *United States*, 348 U. S. 121, 138 (1954). The Government would have been required to prove as part of its case that the gross profit percentages used by petitioners were improper.[10]

No proof of this character was attempted by the Government as part of its case.[11] Instead, under protest petitioners were required to justify their gross profit percentages as part of their case. From that point on the prosecution treated the subject of gross profit percentages as a matter of "defense" (*e.g.*, R 1743a, 1749a-52a). Thus, the case finally went to the jury on a distorted charge of guilt which the defendants were required to disprove.

CONCLUSION

In summary, this case introduces far-reaching innovations into the law of criminal evidence; the court below has condoned conduct of a United States Attorney violative of applicable standards of this Court; and the court has

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[10] The Government might have employed an evidentiary technique standard in such cases—proving the normal gross profit realized by others engaged in the same type of business at the same time and place. See *Harvey* v. *Early*, 189 F. 2d 169, 170 (4 Cir. 1951); *Bechelli* v. *Hofferbert*, 111 F. Supp. 631, 635 (D. Md. 1953); *Miller* v. *Commissioner*, 10 T.C.M. 33 (1951); *Boussen* v. *Commissioner*, 10 T.C.M. 158 (1951); *Shinkonis* v. *Commissioner*, 10 T.C.M. 503 (1951); *Holder* v. *Commissioner*, 11 T.C.M. 91 (1952); *Stone* v. *Commissioner*, 2 T.C. 893 (1954); *Tunningley* v. *Commissioner*, 22 T.C. 1108 (1954); Balter, Fraud Under Federal Tax Law (2d Ed. 1953) 320.

[11] Government's witness Smith, who computed the alleged tax deficiencies under the original charge (R 735a-38a), was not even recalled to recompute the claimed deficiencies under the charge as altered.

sanctioned such a departure from the accepted and usual course of judicial proceedings, in conflict with decisions of other Courts of Appeal, as to call for an exercise of this Court's power of supervision.

Dated: New York, New York,
October 28, 1958.

Respectfully submitted,

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Certificate of Service

William R. Meagher

I, ~~Theodore Kiendl~~, counsel for petitioners in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 28th day of October, 1958, I served copies of the foregoing petition for writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington, 25, D. C., and the United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Dated: October 28, 1958.

William R. Meagher

~~Theodore Kiendl~~,

Counsel for Petitioners.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 383-384—October Term, 1957.

(Argued June 11, 1958 Decided September 3, 1958.)

Docket Nos. 24279-24280

UNITED STATES OF AMERICA,

Appellee,

v.

FAREED N. KIAMIE and KIAMIE MANUFACTURING CO., INC.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

v.

FAREED N. KIAMIE and KIAMIE FABRICS CO., INC.,

Defendants-Appellants.

Before:

HINCKS and WATERMAN, *Circuit Judges*,
and RYAN, *District Judge*.

Defendants were charged in the indictments with corporate income tax evasion. They appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, after a trial before Dimock, *J.*, and a jury. Affirmed.

PAUL W. WILLIAMS, U. S. Attorney, Southern District of New York (JOHN C. LANKENAU, ROBERT KIRTLAND, Asst. U. S. Attorneys, of counsel), for appellee.

DAVIS POLK WARDWELL SUNDERLAND & KIENDL (THEODORE KIENDL, WILLIAM R. MEAGHER, of counsel), New York City, for defendants-appellants.

WATERMAN, *Circuit Judge*:

The appellants, Fareed N. Kiamie, Kiamie Manufacturing Co., Inc., and Kiamie Fabrics Co., Inc., were convicted after a nine-week jury trial upon two indictments charging them with corporate income tax evasion in violation of § 145(b) of the Internal Revenue Code of 1939. The first indictment contained one count charging that Kiamie Manufacturing Co., Inc. and Kiamie, as president, filed a false return understating the corporation's income and tax for its fiscal year ending January 31, 1946. The second indictment, containing three counts, charged that Kiamie Fabrics Co., Inc. and Kiamie, as president, filed false returns understating that corporation's income and taxes for each of its three fiscal years ending April 30, 1945, 1946 and 1947. Kiamie was sentenced to imprisonment for four years on each of the four counts, the prison sentences to run concurrently, and a total fine of $80,000 was imposed by levying $10,000 upon each defendant on each count.

Appellants contend (1) that they were deprived of their constitutional right to be informed of the charges against them and were required to carry the burden of proof by a radical change in the Government's theory of the case which was permitted by the trial court in the midst of the trial; (2) that the evidence under any theory was insufficient to warrant the jury's verdict finding them guilty of wilful evasion of corporate income taxes; (3) that the trial court committed reversible error in rulings on evidence; and (4) that the conduct of the prosecutor was improper

and so prejudicial as to require reversal. Although these issues arise in a factual setting of unusual complexity, we do not think they are of great difficulty. For the reasons hereinafter stated, we hold that appellants' contentions are without substantial merit and that their convictions must be affirmed.

1. *Alleged Change of Theory by the Prosecution*

The indictments charged generally that appellants had violated 26 U. S. C. § 145(b) by wilfully understating corporate income and income taxes for specified fiscal years. Bills of particulars narrowed the charge by stating that appellants had evaded corporate income taxes by wilfully failing to report specified corporate sales in their income tax returns for those fiscal years. The proceeds of these unreported sales, each of which was set forth in the bills by name and address of customer and by invoice amount, were claimed to be net taxable income. Appellants contend that the Government, with the approval of the trial court, departed in mid-trial from this theory of guilt, a theory resting on proof of unreported sales, and made an entirely novel charge that appellants evaded income taxes by applying an improper and dishonest gross profit percentage to the sales that were reported in the tax returns of the defendant corporations for the indictment years. This change in the theory of guilt, appellants contend, was a fatal variance depriving them of their constitutional right to be informed of the charges against them and, in addition, operated to shift the burden of proof from the Government to them.

Evaluation of this contention requires a fuller statement of the positions taken by the parties at various times. From the outset the Government's position was that appellants had wilfully evaded corporate income taxes by concealing unrecorded sales of merchandise. This charge was made known to appellants as early as 1947 and was detailed in the bills of particulars filed in 1951. The Gov-

ernment's case in chief sought to establish this charge by evidence proving that sales had been made which had not been recorded on the corporate books or reported on the tax returns of the defendant corporations, and that these omissions were wilful.

Appellants' position before and during the trial was more complicated. The existence of unrecorded sales was concealed until discovered in 1947 by a revenue agent during an investigation of Kiamie and his corporations. When the first evidence of unrecorded sales was found, Kiamie falsely told his accountant Gellin, who previously did not know of their existence, that the amount was "very, very little." When Gellin found that over $25,000 of unrecorded sales checks had been cashed at the Manufacturers Trust Company, Kiamie stated: "It can't be. It must be a mistake." Later, after the revenue agent had confronted Kiamie's representatives, Lothstein and Gellin, with the secret accounts and unrecorded sales, Lothstein immediately called Kiamie to tell him that the Treasury agents "know everything." Only then did Kiamie admit he had made unrecorded sales and had opened secret bank accounts through Lothstein.

Kiamie then claimed that the unrecorded sales were used to create a cash fund from which black market purchases of goods, similarly unrecorded, had been made. In July 1948 a schedule of alleged cash payments to some twenty-nine vendors (Exhibit MQ), totaling $1,405,157.05 was delivered to the investigating agents as Kiamie's explanation for the unrecorded sales. At the same time a schedule of unrecorded sales (Exhibit 229) totaling $1,323,334.42 was made available to them.

If no further claims had been made, this would have been a relatively simple case. The Government would have attempted to prove wilful concealment of unrecorded sales and appellants would have attempted to prove that the unrecorded sales were matched by a similar amount of unrecorded black market purchases. However, the entire

complexion of the case was radically changed in late 1950 when Kiamie for the first time advanced the claim that the unrecorded sales had in fact been recorded, albeit in an unorthodox fashion.

This new defense was that various intercorporate transactions entered on the books of the Kiamie corporations reflected the unrecorded sales. Thus, while it was claimed that unrecorded sales of merchandise had been made to create a cash fund for black market purchases, it was also claimed that fictitious sales in approximately the same total amounts were entered on the corporate books as having occurred among the various Kiamie enterprises. Appellants contended that these fictitious "intercorporate sales", as they are called, were reported on the income tax returns of the defendant corporations in substitution for the unrecorded actual sales, with the result that the Government received all the taxes due it. Indeed, if appellants' assertions were believed, these procedures resulted in a substantial overpayment of tax.

The intercorporate sale defense went through a considerable evolution. When first advanced by Kiamie in late 1950 to his accountant Solomon and a revenue agent, Kiamie's explanation was that the intercorporate sales matched the unrecorded sales "dollar for dollar and sale for sale." When Solomon analyzed the intercorporate sales, however, he found that they did not match the unrecorded sales in this fashion. In fact, not even one of the thousands of unrecorded sales was matched by an intercorporate sale of an identical amount. When Kiamie was informed of this, he advanced a new explanation, stating that the intercorporate sales were entered from tape totals of the unrecorded sales. Solomon then made another analysis and found that the total unrecorded sales likewise differed substantially from the total of intercorporate sales.

In September 1951 Kiamie hired Batzer, an experienced accountant who had had no previous connection with Kiamie's enterprises, to attempt a further analysis of the

intercorporate sales. By excluding certain of the intercorporate sales and varying the period of analysis Batzer was able to state that the overall totals—not totals month by month or year by year, but the overall totals for the entire three-year period involved in the indictments—of unrecorded sales and intercorporate sales were both in the vicinity of $1,400,000. It was this explanation that appellants advanced at the trial.

It is at this point that the issue of the use and validity of a "gross profit percentage", the issue which appellants claim the Government injected into the case in mid-trial, is encountered. The defense, it will be remembered, claimed that the intercorporate sales of the Kiamie corporations provided a substitute record for the unrecorded sales. For every intercorporate sale, however, there would be of course a corresponding intercorporate purchase. Under orthodox accounting techniques intercorporate transactions could not result in additional overall income being reported, since the amount added to gross sales of one corporation would be offset by an identical amount added to the cost of goods sold of another corporation. To escape this dilemma, appellants contended that the defendant corporations did not obtain the gross profit figure used on their tax returns by subtracting their cost of goods sold from their gross sales. Instead, they claimed that their gross profit—and hence their income tax—had not been understated because their gross profit had been determined by multiplying their gross sales (recorded sales to customers plus intercorporate sales in substitution for unrecorded sales) by a gross profit percentage figure arrived at from experience. This method of reporting income, known as the gross profit percentage method, would reflect the intercorporate sales without offsetting amounts for the corresponding purchases since it disregards cost of goods sold.

The trial court took the position that the validity of the intercorporate sales defense depended upon proof that the corporations utilized an honest gross profit percentage figure in reporting their income. Accordingly, appellants

were not allowed to introduce extensive evidence relating to the intercorporate sales until they had first made an offer of proof with respect to the use of a gross profit percentage figure. Apparently it is this ruling which appellants contend was a radical shift in the theory of the case and operated to shift the burden of proof.

We think it clear that the trial court's action was not erroneous. From the outset of the trial appellants had contended that their tax returns were computed by means of the gross profit percentage method. Defense counsel in his opening statement declared that defendants' proof would show that the inventory figures on their returns had been determined by the use of a gross profit percentage based on "their experience." Early in the trial defense counsel questioned Government witnesses as to the use of the gross profit percentage method by the defendant corporations, the percentages used, and comparable percentages in the industry. And appellants, as part of their intercorporate sales defense, gave considerable attention to the use and accuracy of gross profit percentage figures.

Thus the record reveals that it was not the Government or the trial court which introduced the gross profit percentage figure into the trial. Appellants have only themselves to thank for its presence. Nor were appellants surprised by any ruling of the trial court. It is significant that during the course of the trial no claim of surprise was ever made. Cf. *United States* v. *Klein*, 247 F. 2d 908, 916-917 (2 Cir. 1957), *cert. denied*, 355 U. S. 924 (1958).

Furthermore, we think under the circumstances that the trial court correctly ruled that the use and validity of the gross profit percentage figure was an essential element of the intercorporate sales defense. The trial was a long and complicated one, lasting about nine weeks. Both sides, particularly the defense, sought to go into time-consuming collateral matters that had little bearing on the central issues. It was not error for the trial court to condition the admissibility of extensive evidence relating to the inter-

corporate transactions upon an offer of proof by the defense concerning gross profit percentages. Appellants were contending that their gross profit was not understated because the concealed sales were reflected in their gross sales figure. But the validity of this defense depended upon proof that an honest gross profit percentage figure had been used in computing the reported gross profit made upon these gross sales. Surely if appellants had not used the gross profit percentage method at all, or had used a figure picked at random, the entire defense would fall. Proof that returns were made out by use of an honest gross profit percentage figure calculated in good faith was central to appellants' defense. Requiring appellants to prove an essential element of their defense did not confront them with a new charge or shift the burden of proof.

2. *Sufficiency of the Evidence*

Appellants argue that the Government's evidence was insufficient to support the jury's verdict and that their evidence in defense was so overwhelming that the trial court should have granted their motion to set the verdict aside. Our review of the record has convinced us that the evidence was such as to place the case within the province of the jury. It is unnecessary to recite the evidence in great detail. We will merely summarize the Government's evidence, which the verdict establishes the jury believed, that appellants wilfully evaded corporate income taxes by concealing unrecorded sales of merchandise; and indicate the circumstances which we think made it possible for the jury to disbelieve appellants' defense.

In 1934 the individual defendant, Fareed N. Kiamie, formed one of the defendant corporations, Kiamie Manufacturing Co., Inc. (Kiamie Mfg.). This corporation manufactured and sold ladies' wearing apparel, principally lingerie. Kiamie was its president and sole stockholder. From 1934 until 1943 Kiamie Mfg. was the only corporation owned and operated by Kiamie.

In 1943 Kiamie formed six more corporations—the other corporate defendant, Kiamie Fabrics Co., Inc. (Kiamie Fabrics); Lerena Lingerie Mfg. Co., Inc. (Lerena); Princess Raja Mfg. Co., Inc. (Princess Raja); Princess Helena Mfg. Co., Inc.; Rosamonde Lingerie Mfg. Co., Inc.; and Kiamie International Ltd., Inc. Kiamie owned all the stock and was president of each. In 1944 two of these corporations, Lerena and Princess Raja, disappeared except as trade names when Kiamie merged Lerena with Kiamie Mfg. and Princess Raja with Kiamie Fabrics.

All of these corporations were engaged in the same business. In fact they seem to be little more than separate trade names under which Kiamie manufactured and sold lingerie. The corporations occupied the same premises, shared a common inventory, and were served by the same employees. But since a consolidated corporate income tax return was not filed, each of the corporations was a separate tax entity. Kiamie managed the affairs of all the corporations and was responsible for the filing of their income tax returns.

In June 1944 Kiamie Mfg. and Kiamie Fabrics began making sales which were not recorded on the regular books of the corporations. The total amount of these unrecorded sales, which continued until August 1946, was about $1,100,000, and the amount coming within the fiscal years specified in the indictments was about $650,000. Also, unrecorded sales in the amount of some $350,000 additional were made during the same period by the non-defendant corporations.

These sales were concealed in three ways: (1) use of special invoice books; (2) false voiding of sales invoices; and (3) use of false return memoranda. In addition, one sale was unrecorded because the office copy of the sales invoice was torn from the invoice book. Most of the unrecorded sales of the defendant corporations were concealed from entry on the regular corporate books by use of a special set of Lerena and Princess Raja invoice books. Many sales made in the names of these companies, which

had previously been merged with one or the other of the corporate defendants, were entered by Kiamie's chief bookkeeper, Bernstein, on these special invoice books which were secreted from most of the other employees, and were never routed to the accounts receivable department for recordation on the regular corporate books. Other sales were concealed by falsely voiding sales invoices. After the customer's check in payment for the merchandise covered by the invoice had been received, Kiamie would instruct Bernstein to mark the office copy of the invoice "void" as if the sale had never been made. Invoices so marked were not recorded by the accounts receivable department and, therefore, were not reported on the tax returns. False credit memoranda were used to conceal other sales. After merchandise had been shipped to a customer and the customer's check received in payment, Kiamie would instruct Bernstein to prepare a credit memo falsely indicating that the merchandise had been returned. The effect was to cancel the sale just as if the merchandise had in fact been returned.

Kiamie himself opened the mail and segregated the customers' checks received in payment of the unrecorded sales. The checks received in payment for the unrecorded sales were then given to Bernstein in batches. At Kiamie's instructions she secretly noted "received payment" on the double set of sales invoice books, voided the invoice, or entered a false return memo, according to the method of concealment employed. A memorandum listing the checks in the batch was then prepared and the checks were delivered to one of two check cashers, or to one Lothstein, an attorney on Kiamie's payroll, to be cashed at one of two secret bank accounts which Lothstein had opened for Kiamie at the Manufacturers Trust Company. Checks deposited in these secret accounts were marked with the symbol endorsement of the Chase Discount Company, which Lothstein created for the purpose of cashing Kiamie's checks, but were not endorsed by Kiamie or by the defendant corporations.

Kiamie concealed the unrecorded sales and secret bank accounts from his accountants and, except for the few he relied on to obtain cash or to assist him in the concealment of the records, his employees as well.

We think it obvious that this evidence established a prima facie case of wilful tax evasion. Concealed sales of about $640,000 were proved, or an evasion of about $400,000 of income taxes. The elaborate scheme of concealment included nearly all the badges of fraud listed by the Supreme Court in *Spies* v. *United States*, 317 U. S. 492, 499 (1943):

> "* * * keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

Thus, unless the jury was required to accept appellants' evidence as establishing a complete defense, the jury's verdict must be sustained. Each of the three major phases of appellants' defense—unrecorded black market purchases, substitution of intercorporate sales for unrecorded sales, and application of gross profit percentages to gross sales—will therefore be briefly discussed.

Unrecorded black market purchases. Proof of unrecorded cash purchases of goods equal in amount to the unrecorded sales would have constituted a complete defense if appellants had not contended that the income taxes of the defendant corporations had been computed by a gross profit percentage method which disregarded the cost of goods sold. Even then, proof of such purchases had a vital bearing on the issue of appellants' fraudulent intent since it offered an explanation for the elaborate scheme used to conceal sales. But the evidence was not such that the jury was required to accept this explanation.

It is undisputed that the Kiamie enterprise made large-scale black market purchases of goods. Kiamie's accountant Gellin had advised Kiamie to obtain the cash needed for such dealings by cashing checks drawn on the regular corporate bank accounts to the order of cash. Some $648,000 of corporate checks had been cashed in this manner, and the Government had allowed this amount in full as unrecorded cash purchases. The issue at the trial was whether, and to what extent, black market purchases in excess of this $648,000 were made from the cash obtained by cashing the customers' checks received in payment for unrecorded sales.

Although appellants presented convincing evidence that some such purchases had been made, other evidence entitled the jury to believe that the unrecorded sales were not used solely as a source for black market cash. The total amount of unrecorded purchases excluding those allowed by the Government because the cash was obtained from corporate accounts, did not tally with the total amount of unrecorded sales. The fact that the unrecorded sales continued into late 1946, after wartime shortages had eased, permitted the inference that the unrecorded sales were not used solely for black market purchases. And, too, the Government's evidence disproved certain cash purchases relied on by appellants. The defense never explained why Kiamie kept the unrecorded sales and secret bank accounts from his accountants, although he had no compunction about discussing his black market dealings with them. Finally, the absence of records to support the claimed purchases was itself a factor which the jury could consider.

The intercorporate transactions. *Appellants' primary* defense was that various intercorporate transactions entered in the books of the Kiamie corporations were a substitute record for the unrecorded sales and that taxes were paid on these "intercorporates." There is evidence that intercorporate transactions were so entered in order to allocate costs among the Kiamie enterprises. And there is

evidence, relied on by appellants, that many of these entries were entirely fictitious. Appellants contend that the testimony of Batzer, an outside accountant who analyzed the intercorporate transactions prior to trial, required the jury to bring in verdicts of acquittal since Batzer concluded that the total amounts of unrecorded sales and intercorporates over the indictment period were approximately the same. We disagree.

Batzer's analysis revealed that the intercorporate sales commenced before and continued long after the unrecorded sales; that not one unrecorded sale matched an intercorporate sale; that the monthly totals for all corporations of unrecorded sales never matched the monthly totals for the intercorporate sales; that the total intercorporate sales of all corporations for the period of the unrecorded sales, August 1943 to July 1946, was over $400,000 greater than the unrecorded sales; and that the total intercorporate sales of each corporation did not match its unrecorded sales. These discrepancies, considered together with the evolution of varying explanations advanced by Kiamie, discussed at an earlier point in this opinion, entitled the jury to treat the intercorporate sales defense with skepticism. Here again, the absence of records, including the tape totals which Kiamie claimed to have used in substituting intercorporate sales for unrecorded sales, was a factor which the jury could consider. It is also significant that not one employee of Kiamie testified that the intercorporate sales were entered as substitutes for unrecorded sales, even though several of them would have been in a position to know if this had been done.

The use of gross profit percentage figures. Appellants attempted to prove that the defendant corporations, despite contrary statements in their tax returns, did not compute their taxes from accurately kept inventories but by the use of gross profit percentages. They also attempted to show that the gross profit percentages computable from the figures on the tax returns were reasonable and honest ones. The jury was entitled to disbelieve both of these claims.

The evidence reveals that Kiamie never discussed his gross profit percentage with his accountants and that he arrived at the figure by computations of his own. No records were made or kept by him of this operation. The tax returns reflect a gross profit percentage of approximately 17 per cent although OPA maximum prices permitted a gross profit percentage figure of 30 to 40 per cent. Though the OPA figures disregard overages in purchases, the jury was entitled to believe that the claimed profit figure of 17 per cent was too low. Other circumstances create doubt even on the use of gross profit percentages in computing the tax returns, particularly the circumstance that the percentages, when computed from the figures shown in the returns, turn out to be expressed in hundred thousandths of one per cent. Surely the jury was entitled to believe that a man of Kiamie's loose accounting habits would not compute his gross profit percentage, for example, as 16.23473 per cent—the relationship of gross profit to gross sales found on the 1946 tax return of defendant Kiamie Manufacturing Co., Inc. The substantial differences in the gross profit percentages of the five Kiamie corporations in any given year, and from year to year, justified doubts that such percentages were in fact used.

3. *Rulings on Evidence*

Appellants contend that the trial court committed reversible error (a) by failing to permit the jury to give Exhibit MQ full probative force, (b) by excluding Exhibit NX, and (c) by admitting the Government's Exhibits 330, 331, 332 and 333. These rulings will be briefly reviewed.

Exhibit MQ was a schedule of purported black market cash purchases which had been prepared by Bernstein sometime between October 1947 and July 1948. At the latter time it was delivered to the Government attached by a staple to a schedule of unrecorded sales prepared by Bernstein under Gellin's supervision (Exhibit 229). The schedule of unrecorded sales (Exhibit 229) was received during the

Government's case as proof of the facts stated therein, while the schedule of cash purchases (Exhibit MQ) was received during appellants' case as an explanation of what had been done with the proceeds of the unrecorded sales. Appellants contend that MQ was an integral part of 229 and that it should have been admitted at the same time and given the same probative effect.

The matter arose in this way. After the 1947 conference with the revenue agents, Kiamie's representative Gellin promised agent Troy that he would prepare a schedule of the unrecorded sales. Thereafter, Kiamie supplied Gellin with the necessary records and with his chief bookkeeper, Bernstein, who prepared the schedule under Gellin's supervision. This schedule of unrecorded sales, Exhibit 229, was initially received in evidence as a documentary summary based on Gellin's testimony as to its preparation. Later in the trial, however, the trial court came to consider it as an admission of the defendants and the jury was permitted to give it that effect.

The related schedule of unrecorded cash purchases, Exhibit MQ, was Kiamie's explanation of how the proceeds of the unrecorded sales had been used. It was not admitted with 229 because Gellin testified that it had not been prepared under his supervision and that he had not examined the underlying documents allegedly supporting it. Although Kiamie claimed that these documents once existed, they were never produced and were said to be missing at the time of the trial. Despite this absence of documentary support MQ was subsequently admitted as a 1947 explanation on the part of appellants that the proceeds of unrecorded sales were used to make cash purchases, but it was not admitted as proof of the facts stated therein.

We think that this ruling was not erroneous. MQ was nothing more than unsupported hearsay. It would not have been admissible at all were it not for the fact that Kiamie had attached it to 229 before delivering them both to the Government. 229 having been properly treated as an ad-

mission, MQ could be treated as an exculpatory portion of an admission or as an explanation of an admission. See *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680, 682 (2 Cir. 1944), *cert. denied*, 323 U. S. 769 (1944); *Jayne* v. *Mason & Dixon Lines*, 124 F. 2d 317, 319 (2 Cir. 1941); 7 Wigmore, Evidence §§ 2100, 2113 (3d ed. 1940). It could not properly be given any further effect.

The other evidence rulings complained of appear to us to be well within the discretion of the trial court. Exhibit NX was a list of purported cash purchases not on the corporate books which Batzer prepared for the defense. It was not merely an accountant's summary of records, but necessarily reflected Batzer's evaluation of the credibility of witnesses. Also, its preparation rested on numerous assumptions, some of which were unwarranted by the evidence. We will not upset the trial court's discretionary ruling that this exhibit was "highly unfair" and would have misled the jury. See *United States* v. *Altruda*, 224 F. 2d 935, 942 (2 Cir. 1955); *Steele* v. *United States*, 222 F. 2d 628, 629-630 (5 Cir. 1955); *United States* v. *Johnson*, 319 U. S. 503, 519-520 (1943).

Government Exhibits 330, 331, 332 and 333 were drafts of the New York City gross receipts tax returns of the defendant corporations. They were admitted after the bookkeeper who had prepared them under Kiamie's direction had testified that she had been instructed by Kiamie to deduct the intercorporate sales from gross sales to obtain the gross receipts figure. Even though the draft returns were not the final returns and tended to show the commission of an independent crime, we think the trial court did not abuse its discretion in admitting them as the best available evidence in support of the Government's contention that the intercorporate sales represented cost allocations rather than substitute recordings of the unrecorded sales.

4. *Conduct of the Prosecutor*

Finally, appellants contend that misconduct of the prosecutor deprived them of a fair trial. Although the trial was long and sometimes heated, we think that nothing occurred which requires a reversal. Argument to the jury by the prosecutor that Kiamie had "pocketed" the cash from unreported sales was permissible under the circumstances of the case, since the Government had proved a diversion of $7,000 to Kiamie's personal bank accounts. Proof that Kiamie talked to one of his trusted employees, Joseph, who had helped him conceal unrecorded sales, in Arabic, a language not understood by others present, can scarcely be attacked as prejudicial because the jury might have thought erroneously that Kiamie was an Arab. In any event, the defense made it quite clear to the jury that Kiamie was not an Arab. We are disturbed that the prosecutor stated at the close of his summation his personal belief "that on the facts in this case we have no alternative but to bring back a verdict of guilty on all four counts against Fareed Kiamie and the corporations." But defense counsel had already stressed to the jury his belief in appellants' innocence, and thus, as the trial court put it, placed "the prosecution in the position of having to say, 'Well, I, too, believe in the case that I have been presenting.'" See *Lawn* v. *United States*, 78 S. Ct. 311, 303 n. 15 (1958); *Henderson* v. *United States*, 218 F. 2d 14, 19 (6 Cir. 1955), *cert. denied*, 349 U. S. 920 (1955).

We conclude that the convictions must be affirmed.

Constitutional Provisions, Rules and Statutes Involved

U. S. Const. amend. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Const. amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Federal Rules of Criminal Procedure—Promulgated Under Title 18 U. S. C. §§ 3771-3772

"Rule 2.

PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

"Rule 7.

THE INDICTMENT AND THE INFORMATION

(a) *Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) *Waiver of Indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation of its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) *Surplusage.* The court on motion of the defendant may strike surplusage from the indictment or information.

(e) *Amendment of Information.* The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

"Rule 26.

EVIDENCE

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Title 26 U. S. C. § 145(b)

"Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

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No. 478

In the Supreme Court of the United States

OCTOBER TERM, 1958

FAREED N. KIAMIE, KIAMIE MANUFACTURING CO., INC., AND KIAMIE FABRICS CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. A1-A17) is reported at 258 F. 2d 924.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1958 (Pet. A1), and a petition for rehearing was denied on September 30, 1958. The petition for a writ of certiorari was filed on October 29, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

I. In the course of a tax evasion investigation petitioners had furnished Treasury agents two groups of

schedules—the first involving an admission of concealed sales which at the trial were supported in detail by both oral testimony and documentary evidence, and the second involving a self-serving statement as to a similar amount of unrecorded purchases which were not so supported.

The first question is whether the trial court erred in admitting the first group in evidence and ruling that the second group was admissible only as an exculpatory part of the admission, *i. e.*, as showing that, when the schedules of sales were furnished, petitioners claimed that the funds were expended in accordance with the schedules of alleged disbursements.

2. Whether reversible error was committed when, in response to the closing statement of defense counsel that he thought the petitioners were entitled to an acquittal, the prosecutor expressed his conviction that on the facts in the case there was no alternative but a verdict of guilty—where the trial court thereafter instructed the jury that as the sole judges of the facts they should disregard the opinions of counsel as to the verdict which should be reached.

3. Where the Government's proof, in accordance with the indictments and bills of particulars, established an understatement of petitioners' income resulting from the exclusion of unrecorded sales, whether there was a variance between charge and proof merely because petitioners attempted and failed to show that their income had been correctly computed in a manner different from that indicated in their returns.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145—PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b)).

STATEMENT

On July 12, 1951, there were filed against petitioners in the United States District Court for the Southern District of New York two indictments alleging that they had willfully attempted to evade corporate taxes by filing false and fraudulent returns in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 1a, 15a–19a.)[1] The amounts of net income and tax liability thereon, as reported in the re-

[1] References to the appellant's appendix in the Court of Appeals are designated "R". References to the Government's appendix in that court are designated "GA".

turns and as corrected, were alleged to be as follows (R. 16a–19a):

Corporation and year	Net income		Tax liability	
	Reported	Corrected	Reported	Corrected
Kiamie Mfg. Co., Inc.:				
F. Y. ended 1/31/46	$19,725.31	$136,554.15	$5,158.83	$98,142.64
Kiamie Fabrics Co., Inc.:				
F. Y. ended 4/30/45	3,285.92	384,396.85	*821.48	290,848.30
F. Y. ended 4/30/46	5,915.52	167,825.27	1,419.40	109,953.41
F. Y. ended 4/30/47	8,086.06	28,104.35	1,759.79	7,395.29
Totals	37,012.81	716,880.62	9,159.50	506,339.64

After a jury trial lasting almost nine weeks, the petitioners were found guilty as charged on all counts. (R. 1865a.) On May 21, 1956, petitioner Fareed Kiamie was fined $10,000 on each of the four counts and given concurrent four-year prison sentences on each count. The petitioner corporations were fined $10,000 on each count in which they were named, a total fine against the corporations of $40,000. (R. 1901a–1908a.)

The evidence established concealment of vast amounts of corporate sales by a variety of fraudulent devices, including double sets of books, dummy corporations, a secret bank account, and false statements to the authorities. The total of corporate tax, the evasion of which was attempted, was $402,146.74. (R. 735a–738a.) When the investigating agents began to uncover the scheme, Kiamie invented one false explanation after another over the succeeding years, all of which were disproved at the trial.

The Kiamie Manufacturing Company, Inc., which was organized in 1934 by Fareed N. Kiamie, engaged in the manufacture and sale of ladies' lingerie. (Govt. Ex. 9; R. 432a.) Kiamie was its president

and sole stockholder. (R. 432a.) In 1943, Kiamie formed six more corporations: petitioner Kiamie Fabrics Company, Inc., Lerena Lingerie Manufacturing Company, Inc., Princess Raja Manufacturing Company, Inc., Princess Helena Manufacturing Company, Inc., Rosamonde Lingerie Manufacturing Company, Inc. and Kiamie International Ltd., Inc. (Govt. Exs. 10, 12, 13; R. 432a–433a, 759a–760a.) Kiamie owned all the stock and was the president of all the corporations. (R. 432a.) Early in 1944, Kiamie merged Lerena with petitioner Kiamie Manufacturing and merged Princess Raja with petitioner Kiamie Fabrics. (Govt. Exs. 11, 14.) All of these corporations sold the same type of merchandise, shared a common inventory, occupied the same premises, and were served by the same employees. (Deft. Ex. NO; R. 494a–495a, 1195a–1196a, 1245a–1246a.) They filed separate income tax returns, however, rather than consolidated returns. (R. 480a–482a.)

Kiamie personally supervised the employees of the corporations and watched closely the corporations' financial affairs, receiving monthly financial statements of their activities. (R. 431a–433a, 481a, 1127a, 1272a–1273a, 1322a, 1408a.) Annual financial statements of the corporations were first submitted for review by Kiamie. After having certain adjustments made in the figures, Kiamie furnished inventory figures to the accountants, who then prepared a pencil copy of the corporate tax returns. These were submitted to Kiamie for further review and approval before being typewritten in final form. (R. 481a–483a.)

Between June, 1944, and August, 1946, the petitioner corporations made unrecorded and unreported sales totalling in excess of one million dollars. (Govt. Ex. 229; Deft. Ex. NS.) The bulk of these suppressed sales were concealed by double sets of corporate sales invoice books. For example, Kiamie Manufacturing made sales on printed invoices of Lerena Lingerie Manufacturing Company, Inc., the "Inc." being stricken off. Since Lerena Lingerie Manufacturing Company had been incorporated as Lerena Lingerie Manufacturing Co., Inc., in December, 1943, and had merged with Kiamie Manufacturing in February, 1944, Lerena Lingerie Manufacturing Company was not in existence except as a camouflage for unreported sales of Kiamie Manufacturing. (Govt. Exs. 10, 14, 144; R. 433a, 575a-581a.) In the same manner, Kiamie Fabrics made sales on sales invoices of Princess Raja Manufacturing Company, Inc., which were altered by striking off the "Inc." At the time this was done the Princess Raja Manufacturing Company did not exist because it had been incorporated in December, 1943, and had been merged in May, 1944, with Kiamie Fabrics. (Govt. Exs. 11, 13, 45, 233; R. 433a, 564a–575a, 580a-581a.)

Another method of suppressing sales was by the false voiding of sales invoices. Upon receiving checks in payment of sales, Kiamie would instruct his chief bookkeeper, Bernstein, to mark the office copy of the invoice "void" as if the sale had never been made. Invoices so marked were not recorded by the accounts receivable department, and hence were not reported

on the tax returns. (Govt. Ex. 116; R. 195a–198a, 601a–603a, 1127a–1128a.) A third method of concealment lay in the use of false credit memoranda. After checks had been received in payment of merchandise shipped, Kiamie would instruct Bernstein to prepare credit memoranda falsely indicating that the merchandise had been returned, resulting in cancellation of the sale just as if the merchandise had in fact been returned. (Govt. Ex. 190; R. 253a–254a, 603a–607a, 1128a–1129a.)

Kiamie delivered to Bernstein in batches the checks in payment of unrecorded sales with instructions to list them on memoranda. The checks were then turned over to one of two check cashers, or to Lothstein, an attorney on Kiamie's payroll, to be cashed or deposited in a secret bank account which Lothstein had opened for Kiamie at the Manufacturers Trust Company. Checks so deposited were marked with the symbol endorsement of the Chase Discount Company, which Lothstein created for the purpose of negotiating Kiamie's checks, but were not endorsed by Kiamie or the corporations. Kiamie concealed the unrecorded sales and secret bank account from his accountants and from virtually all his employees. (Govt. Exs. 197–198, 216–219, 225–227, 229, 318; R. 303a–310a, 336a–338a, 437a, 440a, 443a, 468a–477a, 781a–783a, 1065a, 1070a–1074a, 1102a–1103a, 1129a, 1194a, 1279a–1280a, 1691a.)

The total understatement of net income by the two petitioner corporations during the prosecution years was $643,131.16, resulting in a tax deficiency of

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$402,146.74. (Govt. Exs. 233, 308–311; R. 599a–601a, 734a–738a.)

These defalcations first began to come to light in 1947, when a Treasury agent discovered that checks paid to some of the Kiamie corporations had been cashed at the Manufacturers Trust Company. He passed this information on to Gellin, Kiamie's accountant, and Gellin agreed to talk to Kiamie. Gellin suggested to Kiamie that the bank's records be audited to determine whether customers' checks had been cashed, and Kiamie falsely stated that he did not "believe he cashed very much. If he did, it was very, very little." (R. 436a.) After two or three days of auditing, Gellin advised Kiamie that he had already found about $25,000 of such cashed checks. Again Kiamie gave a false explanation, replying "It can't be. It must be a mistake." (R. 436a–437a.) Shortly thereafter, all funds were withdrawn from the Chase Discount account and it was closed. (Govt. Exs. 197, 201–202.) Later, in October, 1947, the account came to the attention of the investigating agents. When the agents confronted Kiamie's representatives with the secret account and unrecorded sales, Lothstein immediately called Kiamie to tell him that the Treasury agents "know everything." (R. 437a–440a.) Kiamie then admitted for the first time that he had made unrecorded sales and had opened a secret bank account through Lothstein, but claimed

[2] In fact, Kiamie had caused to be cashed at least $50,000 of customers' checks at the Manufacturers Trust Company. (Govt. Ex. 229.)

that the proceeds had been used to purchase merchandise for the corporations. (R. 440a.)

In July, 1948, Kiamie's representatives submitted to the Internal Revenue Service a schedule of alleged cash payments to vendors (Deft. Ex. MQ) totalling $1,405,157.05, as Kiamie's explanation for the unrecorded sales, together with a detailed schedule of unrecorded sales (Govt. Ex. 229) totalling $1,323,334.42. (R. 452a, 478a–480a, 612a.) The latter schedule was supported by underlying documents. (R. 441a–444a, 468a–476a, 595a–596a.) The schedule of alleged cash payments for purchases, however, was unsupported. (R. 617a, 626a–627a.)

By October, 1950, the internal revenue agents had completed their investigation. (R. 682a, 722a.) Although Kiamie's representatives had been "consulting with the Treasury Department continuously" (R. 524a), they had never contended that the unreported sales had, in fact, been recorded on the books or reported in the tax returns (R. 626a, 645a, 722a). Late in 1950, over three years after the investigation had begun, Kiamie advanced the entirely new defense that the unreported sales had been recorded as intercorporate sales. (R. 722a, 1696a–1697a.) Kiamie claimed that these sales had all been reported as intercorporate sales which he thought could be matched with the unrecorded sales "dollar for dollar and sale for sale." (R. 1695a–1696a.) One of Kiamie's accountants, Solomon, then made an extensive analysis of the intercorporate sales in an attempt to prove the truth of what Kiamie had said. The analysis, however, proved

just the converse: of the thousands of unrecorded sales invoices not one matched an intercorporate sale. (R. 1697a–1698a.) When Solomon told Kiamie what he had found, Kiamie changed his explanation, stating that the intercorporate sales were entered from tape totals of the unrecorded sales. (R. 1697a–1698a.) Solomon made a new analysis and found that Kiamie's new explanation was also false. The total unrecorded sales differed substantially from the total intercorporate sales. (R. 1699a–1700a.)

Kiamie then hired an outside accountant, Batzer, to undertake an analysis of the intercorporate sales on still another basis. While Kiamie had led Solomon to believe that all intercorporate sales reflected unrecorded sales, Batzer included only those intercorporate sales recorded in the sales account of the general ledger, thereby excluding many intercorporate sales. (R. 1698a–1699a, 1700a–1702a.) Batzer, by means of these exclusions and by dropping from his computations the months of April, 1946, through July, 1946, was able to conclude that unrecorded sales and intercorporate sales were within some $23,000 of being in agreement, both totalling approximately $1,400,000. (Deft. Exs. NS, NT.) Batzer admitted, however, that the intercorporate sales commenced before and continued long after the unrecorded sales (R. 1580a–1581a, 1611a–1613a); that not a single unrecorded sale matched an intercorporate sale by date and amount (R. 1579a); that the monthly totals for all of the Kiamie corporations' unrecorded sales never matched the intercorporate sales (Govt. Ex.

327); that the total intercorporate sales of all Kiamie corporations for the entire period of the unrecorded sales (August, 1943, through July, 1946) was over $400,000 greater than the unrecorded sales (Deft. Exs. NS, NT); that in August, 1944, the total intercorporate sales to date exceeded the unrecorded sales by almost $100,000, although Kiamie was contending that the intercorporate sales were entered from tape totals of the unrecorded sales (Govt. Ex. 327; R. 1583a–1586a); and that the total intercorporate sales of none of the corporations matched its unrecorded sales (Deft. Exs. NS, NT).[3]

Nevertheless, Batzer was the principal defense witness at the trial, and the defense was based upon the theory that omission from the returns of the unrecorded sales did not result in a tax due and owing because of the erroneous inclusion of fictitious intercorporate sales in the gross income figures reported. Apparently recognizing that this defense would be unavailing—because each intercorporate sale was, of course, offset by an intercorporate purchase—the petitioners also contended that their gross profits had been computed by applying estimated gross profit percentages to the total sales rather than by the orthodox method of computing and subtracting the cost of goods

[3] The unrecorded sales of Kiamie Fabrics for the period August, 1943, to July, 1946, totalled $611,995.78, as compared with intercorporate sales of only $330,246.58. The unrecorded sales of Kiamie Manufacturing during that period totalled $505,447.45, as compared with intercorporate sales of $831,335.85. These figures include the unrecorded and intercorporate sales of Princess Raja and Lerena, respectively. (Deft. Exs. NS, NT.)

sold from the total sales. (R. 1450a–1475a, 1480a–1560a; GA 24a–37a.) If this could have been proved, the overall effect of inclusion of fictitious intercorporate sales would have been to offset the omission of the unrecorded sales. In contravention of this defense there were, among other things, (1) the fact that the returns themselves showed that gross profit from sales was arrived at by subtracting from gross sales the cost of goods sold computed in the orthodox manner;[4] (2) the belated nature of the contention, which evolved gradually, beginning in the fourth year of the investigation (*supra*, pp. 9–11); (3) the fact that the intercorporate sales were actually a means of allocating costs among the various corporations (R. 691a–692a, 1582a);[5] (4) the fact that the gross profits percentage formula which

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[4] Thus, for example, Schedule A of the return of Kiamie Manufacturing Company, Inc., for the fiscal year ending January 31, 1946, revealed that cost of goods sold was computed as follows (Govt. Ex. 1):

Inventory at beginning of year	$184,371.29
Material or merchandise bought for manufacture or sale	1,453,509.01
Salaries and wages	214,934.87
* * * * *	
Total	$1,852,815.17
Less: Inventory at end of year	217,664.78
Cost of goods sold (enter as item 2, page 1)	$1,635,150.39

See also the testimony of defense witness Batzer. (R. 1591a–1593a.)

[5] Kiamie had ordered all intercorporate sales eliminated from the gross sales in reporting the gross receipts of the corporations to the New York City tax authorities. (Govt. Exs. 330–333; R. 1663a–1668a.)

would result in the gross profit actually reported would have to be expressed in hundred thousandths of a percent (*e. g.*, the gross profit of Kiamie Manufacturing for its prosecution year would be 16.23473% (Govt. Ex. 1)); and (5) the fact that under OPA regulations the corporations were allowed a gross profit ranging between 30% and 40%, compared with a reported profit ranging from 15% to 20% if computed by such a formula (Govt. Exs. 1–4, 340; R. 1713a–1714a).

ARGUMENT

1. There is no merit in the petitioners' first contention, that the trial court erred in not permitting the jury to give full probative effect to defendants' Exhibit MQ, the schedule of alleged black market cash payments to vendors which were unrecorded on the corporations' books and unreported on the tax returns. (Pet. 8–13.) This exhibit was submitted to the Treasury agents by petitioners' representatives in 1948 together with Government's Exhibit 229, a detailed schedule of sales admitted to have been unrecorded and unreported. (*Supra*, p. 9.) Government's Exhibit 229 was prepared under the supervision of Gellin, one of the petitioners' accountants, from supporting documents introduced into evidence by the Government at the trial (R. 441a–444a, 468a–476a, 595a–598a), and was received in evidence on Gellin's testimony (R. 466a) Gellin, however, had nothing to do with the preparation of defendants' Exhibit MQ and he never saw the records which Bernstein, the bookkeeper, claimed to have used in its preparation. (R. 478a,

489a–490a.) Indeed, Exhibit MQ was wholly unsupported by records. Bernstein claimed at the trial that the records (alleged to have been "tally sheets") were missing, although Kiamie was the last person who was supposed to have had them. (R. 1139a–1141a, 1706a–1707a.) Nevertheless, the trial court admitted Exhibit MQ into evidence on the theory that it was a part of the admission embodied in Exhibit 229, since the two groups of documents were submitted at the same time, stapled together. (*Supra*, p. 9; R. 981a–982a.) Since Exhibit MQ was unsupported hearsay, the court admitted it not as proof of the facts asserted but as part of the admission contained in Exhibit 229, *i. e.*, as showing that at the time the papers were submitted Kiamie made the claim that the funds were expended as shown in Exhibit MQ. This ruling was clearly correct. *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680, 682 (C. A. 2d), certiorari denied, 323 U. S. 769; VII Wigmore, *Evidence*, Secs. 2100, 2113, 2119. Exhibit MQ would not have been admissible for any purpose except on the theory that it constituted an exculpatory portion of the admission, and certainly the jury should not have been permitted to give full probative force to mere self-serving lists purporting, without proof, to account for the expenditure of some $1,400,000. Moreover, petitioners have not shown that they were prejudiced by the admission of Exhibit MQ solely as an exculpatory statement. The trial court made it very clear that they were free to introduce competent evidence of the alleged expenditures if they so desired. (R. 982a–983a.)

The cases asserted by petitioners to be in conflict with the instant case are easily distinguishable. In

Insurance Co. v. Newton, 89 U. S. 32, the very language of this Court relied upon by petitioners (Pet. 10–11) shows that the crucial matter erroneously excluded from evidence was an integral, inseparable part of the matter admitted into evidence and was proved by the same documents and with equal trustworthiness. In the case at bar we have two groups of schedules, joined only by a staple, one involving an admission as to sales supported in detail by both oral testimony and documentary evidence, and the other involving a self-serving statement as to purchases without such support. In *Perrin* v. *United States,* 169 Fed. 17 (C. A. 9th), unlike the instant case, the self-serving statement was excluded entirely even though it had been expressly incorporated by reference into the admission, and the trial court refused to permit the witness to testify as to the matters contained in the admission. We submit that no conflict is presented and that the trial court was plainly right in admitting defendants' Exhibit MQ only as an exculpatory part of the admission.

2. Equally without merit is the contention (Pet. 13–16) that the prosecutor committed reversible error in the closing sentences of his summation, when he stated (R. 1778a):

> Now I am sworn to an oath, and you have sworn to your oath. It is not a pleasant thing that we do, but it is a very necessary thing, and I say to you ladies and gentlemen of the jury from the bottom of my heart, that on the facts in this case we have no alternative but to bring

> back a verdict of guilty on all four counts against Fareed Kiamie and the corporations.
>
> Thank you very much.

As the trial court pointed out (GA 286a), the remarks were invited by defense counsel when he stated at the close of his summation (GA 285a):

> I don't think I need say much more. You know the charge; you have heard the evidence. I think he is entitled to an acquittal, and I don't think you can brand him a criminal on the kind of testimony that has been produced before you.
>
> Thank you very much.

Petitioners are in no position to complain of comments which they themselves invited. Cf. *Lawn* v. *United States*, 355 U. S. 339, 359–360 (fn. 15) and cases cited. It is permissible for the prosecutor to ask the jury for a conviction and to express his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C. A. 6th), and cases cited. In the instant case, in sharp contrast to the case relied upon by the petitioners (Pet. 15–16, *Berger* v. *United States*, 295 U. S. 78), the prosecutor did not state or imply that he was relying upon evidence known to him but not introduced before the jury, but in the very sentence complained of made it clear that he was relying upon "the facts in this case" (R. 1778a).

It should be noted, moreover, that when defense counsel first raised this objection on the day following

the summations (R. 1779a–1780a) the trial court agreed to comment on the matter in his charge to the jury (R. 1794a–1795a). His instruction on the subject was as follows (R. 1845a):

> As I have told you several times, you are the sole judges of the facts. Counsel's opinions as to what you are going to do or what you ought to do are completely immaterial and should be disregarded by you.

We submit that if there was any impropriety in the prosecutor's statement it was so trivial against the background of a trial lasting almost nine weeks that it was completely cured by the above instruction.

3. Petitioners finally contend (Pet. 16–20) that they were deprived of their constitutional right to be informed of the charges against them because the Government, during the trial, allegedly departed from the theory set forth in the bills of particulars (which listed specific unreported sales) and asserted that the tax evasion was attempted by applying an improper gross profit percentage. This argument is also without substance. The petitioners were informed of the exact nature of the charges against them four years before the trial when the Government filed its bills of particulars listing the names and addresses of the customers involved in the unreported sales, and the total amount sold to each customer during each fiscal year. (R. 24a–27a, 32a–45a.) These were changed in minor respects by amended bills of particulars filed two months before the trial. (R. 47a–51a, 53a–66a.) The Government's case was tried on the theory set forth in the bills of particulars (Pet. 4), and this theory ac-

cepted the cost of goods sold and the method of computing gross profit shown in the petitioners' returns.* See *United States* v. *Bender*, 218 F. 2d 869, 871–872 (C. A. 7th), certiorari denied, 349 U. S. 920; *United States* v. *Stayback*, 212 F. 2d 313, 316–317 (C. A. 3d); *Clark* v. *United States*, 211 F. 2d 100, 103 (C. A. 8th).

One of the elements of the crime thus proved was an additional tax due and owing as a result of petitioners' failure to report the unrecorded sales. Apparently, however, even petitioners ultimately recognized the futility of attempting to attack directly the Government's proof of this element; it was too obvious that the intercorporate sales did not in fact represent the unrecorded sales. Accordingly, petitioners concentrated on attacking indirectly the Government's proof of an additional tax due and owing, this attack taking the form of the defense theory which first injected the issue of a gross profit percentage into the trial. Thus, the defense undertook to show that there was no additional tax due and owing because "the gross profit was a correct figure" (GA 32a), arrived at by applying to sales, including fictitious intercorporate sales which at least equalled the excluded unrecorded sales, a gross profit percentage based on "their experience" (R. 89a). When in this connection questions arose as to the admissibility of certain summary charts offered by the defense, the trial court took the position that the documents would be inadmissible without proof that the gross profits were computed as

* The contention with respect to the sufficiency of this evidence, advanced by petitioners below, has been abandoned here.

a percentage of sales, and that the percentage applied was at least approximately correct. (R. 1458a–1469a.) In this the court was plainly correct, for without evidence that there was actually employed a profits percentage formula, and that such formula had some basis of accuracy, the computations in the schedules offered would be totally irrelevant. The petitioners apparently realized this fact early in the trial, for it was in his opening statement that defense counsel asserted that the alleged gross profit percentage was based upon "their experience." (R. 89a; cf. GA 32a.) Later, however, the defense took the position that the Government presumably had to accept the incredible claim (*supra*, pp. 10–13) that a percentage formula had been actually employed, and had the burden of showing that the percentage allegedly used was incorrect. (R. 1459a.) We submit that the Court of Appeals was clearly right in holding that to require petitioners "to prove an essential element of their defense did not confront them with a new charge or shift the burden of proof" (Pet. A8), and that "It is significant that during the course of the trial no claim of surprise was ever made." (Pet. A7.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1958

No. 478

FAREED N. KIAMIE, KIAMIE MANUFACTURING CO., INC., and KIAMIE FABRICS CO., INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This reply to respondent's brief filed November 26, 1958 is respectfully submitted pursuant to Rule 24(4) of this Court.

1. *Exhibit MQ as an Admission* (Resp. 13-15).[1] Respondent's position is that an admission may not be received in evidence as any proof of its contents unless supported by independent evidence (Resp. 2, 9, 13-14). This contention is contrary to basic principles of evidence and conflicts with the holding of this Court in *Insurance Company v. Newton*, 89 U. S. 32, and decisions of other circuits (Pet. 10-11).

Respondent seeks to avoid or dull the impact of this issue by beclouding the nature of Exhibit 229. On page

[1] "Resp." refers to respondent's brief; "Pet." refers to the petition herein.

13 respondent states that 229 "was received in evidence on Gellin's testimony"; on page 14 that MQ was received in evidence "on the theory that it was a part of the admission embodied in Exhibit 229, since the two groups of documents were submitted at the same time, stapled together"; and, again, that MQ "constituted an exculpatory portion of the admission".

No amount of verbal camouflage can hide the fact, recognized by both lower courts, that 229 was admitted in evidence as—and given the full force of—an admission. The trial court instructed the jury that the Government "used this paper [229] as an admission by the defendant that that money had been received and offered that to you as evidence that it really had been received, for you to consider" (R 982a). The Court of Appeals states with respect to 229 that "the trial court came to consider it as an admission of the defendants and the jury was permitted to give it that effect" (A 15).

It is equally clear, as respondent states (Resp. 14), that MQ was received as "a part" of the admission embodied in 229 (A 16), but the jury were instructed not to consider MQ as any proof of its contents (Pet. 9-10).

A document admitted in evidence as an admission is not subject to challenge as hearsay (Pet. 10-11). The records which "support" an admission do not affect its admissibility but bear solely on its weight and that is for the jury alone to determine. It is fundamental with respect to admissions that "once admitted into evidence they may be used as substantive proof for either party." *Link* v. *Eastern Aircraft*, 57 A. 2d 8, 9 (N. J. 1948).

Respondent contends that the excluded matter in *Newton* was "an integral, inseparable part of the matter admitted into evidence and was proved by the same documents and with equal trustworthiness" (Resp. 15). As indicated, the "trustworthiness" is a matter of weight, entirely for the jury. As to the inseparability of the documents, respondent

concedes that MQ was "a part of" 229, as the courts below recognized (R 981a-83a; A 16). Government witness Gellin, on whose testimony respondent now bases the reception of 229 in evidence, testified that "all the papers were put together as one report, the first part of the schedule [229], where all the sales were itemized, and this part of the report [MQ], right in back, and it was packed as one report" (R 490a). Indeed, MQ is incorporated by reference into 229 by the express statement in the latter that the "proceeds" of the sales listed therein "were used in payment for merchandise purchased" (Exhibit Volume, Exh. 229, p. 308).

In the *Perrin* case (Resp. 15; Pet. 11) the Court of Appeals for the Ninth Circuit followed the *Newton* principle, quoting this Court's opinion and other authorities, including the following excerpt from Best's Law of Evidence (169 Fed. at 26):

> "Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any self-serving statements it contains."

The court also quoted extensively from a decision by the Supreme Court of Maine, as follows (*id.* at 26-7):

> "* * * This court in *Storer* v. *Gowen*, 18 Me. 176, have held that: 'It is a principle well settled that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as against him. Both are equal evidence to the jury, who will give every part of the testimony such credence as it may appear to deserve. * * * And the [Massachusetts] court says in *O'Brien* v. *Cheney*, 5 Cush. 148: 'The general principle for which the defendant contends, namely, that, when the admission of a part is offered in evidence, he is entitled to have the whole of what he said on the subject, at that interview, stated as a part of the evidence, is correct and is not denied. * * *
>
> * * * in Moore v. Wright, 90 Ill. 473, the court holds that: 'where a party's admissions are called

> for, the party calling for the same is bound to take all the other party said upon the occasion concerning the matter in dispute, whether it makes for or against him.' It is unnecessary to make further citations. The above, we think, is a fair statement of the practice both in this country and England with respect to the admissibility of admission [sic] as testimony."

The asserted conflict is real. The ruling below crucially affected the petitioners' defense, of which MQ was a vital element.[2] The prosecutor used 229 as the crux of his case and as an admission in order to gain advantage of the strong probative force which naturally attaches to an admission. Having taken such advantage he should have been required to accept the disadvantage of MQ which was an integral part of the entire admission. Obviously, the Government would never have been given 229 without the explanation incorporated in MQ.

MQ was not even given the effect described by respondent (p. 14), but was discredited by the trial court's charge that the document "cannot be treated as proof" but only as showing that the petitioners "made this claim" (Pet. 9). The result was effectively to deprive MQ not merely of "full probative force" (Resp. 14) but of *any* probative force and unduly to magnify the weight of 229.

2. *The Prosecutor's Summation* (Resp. 15-17). The compelling and prejudicial identification of the jury's duty with the prosecutor's was in no sense invited by the defendant's summation, as in *Lawn* v. *United States*, 355 U. S. 339, 359, and went far beyond the mere statement of personal belief in *Henderson* v. *United States*, 218 F. 2d

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[2] As the Court of Appeals stated (A 4): "If no further claims had been made, this would have been a relatively simple case. The Government would have attempted to prove wilful concealment of unrecorded sales and appellants would have attempted to prove that the unrecorded sales were matched by a similar amount of unrecorded black market purchases."

14, 19 (6th Cir. 1955). The perfunctory generality toward the end of the trial court's charge to the effect that "counsels' opinions" should be disregarded (R 1845a) was no more effectual than the admonition in *Berger* v. *United States*, 295 U. S. 78, 85. There the Court, noting that the judge instructed the jury to "disregard" the prosecutor's statements, concluded (*ibid.*):

> "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

3. *The Fatal Variance* (Resp. 17-19). The indictment charged wilful understatement of corporate income by failure to report specific sales.

On pages 17-18 respondent states: "The Government's case was tried on the theory set forth in the bills of particulars (Pet. 4), and this theory accepted the cost of goods sold and the method of computing gross profit shown in the petitioners' returns." Respondent continues that "One of the elements of the crime thus proved was an additional tax due and owing as a result of petitioners' failure to report the unrecorded sales." This in fact was the entire crime charged, not merely one of the elements, but it was not the crime tried. The trial court refused to permit petitioners to introduce evidence that the intercorporate sales did in fact represent the unrecorded sales, unless they went further and proved (1) that a gross profit percentage had been applied to the reported sales in computing the tax and (2) that the gross profit percentage which was applied was a proper one. When the Government questioned the propriety of the gross profit percentage which was applied, it attacked "the cost of goods sold" as stated in the returns and as admitted in the bills of particulars (Pet. 7, 18).

At the trial it was shown by Government witness Gellin, the corporate accountant, that the "fictitious intercorporate sales" were reflected on the books of the corporation,

intentionally entered to reflect the unrecorded sales[3], taken by accountant Gellin as actual sales, and included in the returns (R 519a, 529a, 548a, 1518a). It was further shown by witness Gellin that the taxes were computed on the basis of the sales shown on the books (R 548a).

Respondent states "it was too obvious that the intercorporate sales did not in fact represent the unrecorded sales" (p. 18). In fact, the trial court charged the jury that the evidence that the intercorporate sales reported in the corporate returns were fictitious was "overwhelming" and, further, that to determine whether gross profit had been understated the jury should deduct such intercorporate sales from reported gross sales and then add the unrecorded sales (Pet. 6). Had that been the only issue submitted to the jury they could not have found that the income of the corporate defendants had been understated, since the fictitious intercorporates in fact reported in the returns fully offset the unrecorded sales (Pet. 6; G 229, Cts. Exh. 4).

In holding there had not been a shifting of theory or of burden of proof, the Court of Appeals approved the trial court's ruling "that the validity of the intercorporate sales defense depended upon proof that the corporations utilized an honest gross profit percentage figure in reporting their income" (A 6). The court based this conclusion squarely on the following erroneous premise:

> "For every intercorporate sale, however, there would be of course a corresponding intercorporate purchase. Under orthodox accounting techniques intercorporate transactions could not result in additional overall income being reported, since the amount added to gross sales of one corporation would be offset by an identical amount added to the cost of goods sold of another corporation." (A 6)

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[3] The inclusion was not "erroneous", as respondent contends (Resp. 11).

This completely overlooks the indisputable fact that only Kiamie Mfg. and Kiamie Fabrics were indicted. The other three Kiamie corporations—Princess Helena Mfg. Co. Inc. (Helena), Rosamonde Lingerie Mfg. Co. Inc. (Rosamonde), and Kiamie International Ltd. Inc. (International)—were not indicted. Moreover, as the Court of Appeals quite properly held, "each of the corporations was a separate tax entity" (A 9).

An intercorporate sale by Kiamie Mfg. obviously could not result in a corresponding intercorporate purchase by that corporation. Nor would an intercorporate sale by Kiamie Mfg. result in a corresponding intercorporate purchase by Kiamie Fabrics, unless the transaction (admittedly fictitious) were entered in the books as having taken place between those two corporations. On the other hand, intercorporate sales recorded as having been made by Kiamie Mfg. or Kiamie Fabrics to the non-defendants Helena, Rosamonde or International would result in additional income being reported by Kiamie Mfg. or Kiamie Fabrics which would not be offset by the corresponding amounts added to the cost of goods sold of the non-defendants Helena, Rosamonde or International. It is wholly immaterial that in such case the non-defendant corporations would increase the cost of goods sold reported in their returns, since each such corporation is "a separate tax entity", its income taxes are not involved in the instant indictments and it is not charged with any income tax evasion.

Therefore, in holding with respect to the two petitioner-corporations that each intercorporate sale would be offset by the corresponding intercorporate purchase, the lower courts necessarily disregarded the "separate" tax entities of all five Kiamie corporations. This single error caused the trial court not only to change the charge in the indictment but to shift to the defendants the burden of proving material which the prosecution would have had to prove if such material had in fact been an element of the charge.

The shift in burden of proof makes the variance here involved far more insidious than that which existed in the decisions of other Circuits which conflict with the holding below (Pet. 17, 19).

New York, N. Y.,
December 3, 1958.

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